[HIGH COURT OF AUSTRALIA.]

MacCORMICK . . . . . Appellant;

AND

THE FEDERAL COMMISSIONER OF TAXATION Respondent.

H. C. of A. 1945.

Sydney, *May* 7, 8; *June* 27.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

Gift Duty—Exemption—Gift "for or towards the maintenance, education or apprenticeship of any person"—Marriage settlement—Trust fund—Gift of part of fund to intended wife—Gift over to children of marriage—Power of appointment by wife—Gift of balance of fund to intended wife's adopted infant daughter for her "maintenance, support and personal benefit"—Discretionary power of trustees——"Satisfaction" of Commissioner—Rule applied by Commissioner—Appeal therefrom—Gift Duty Assessment Act 1941-1942 (*No.* 52 *of* 1941—*No.* 17 *of* 1942), *s.* 14 (*i*) (ii).

Section 14 (*i*) (ii) of the *Gift Duty Assessment Act* 1941-1942 provides:—"Notwithstanding anything contained in this Act, gift duty shall not be payable in respect of . . . (*i*) any gift concerning which the Commissioner is satisfied . . . (ii) that the gift is made for or towards the maintenance, education or apprenticeship of any person, and is not excessive in amount, having regard to the legal and moral obligations of the donor to afford the maintenance, education or apprenticeship."

A settlor executed a marriage settlement whereby he settled a considerable fund upon trust for himself until solemnization of his intended marriage and thereafter upon trust: (*a*) As to two-thirds of the fund that the trustees should pay the net income derived therefrom to his intended wife during her life for her separate use and without power of anticipation and after her death hold the capital and income of the two-thirds upon trust for children of the marriage with gifts over in certain events. (*b*) As to the remaining one-third of the fund upon trust for an adopted daughter of his intended wife so that the same should not vest in the daughter absolutely until she attained the age of thirty-five years. The trustees were empowered, during the infancy of the daughter, to apply the income thereof as they in their discretion should think fit for her "maintenance, support and personal benefit." Any accumulation could also be applied in subsequent years for her "support or benefit." After the daughter attained twenty-one years she was to be entitled to the income of

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the one-third of the fund for her absolute use and benefit. The trustees were authorized in their absolute discretion, after the daughter had attained twenty-one years or married, to pay or vest in her or apply for her advancement or benefit the whole or any portion of the capital of the one-third of the fund. The Deputy Federal Commissioner of Taxation, applying a general, though not an absolute, rule that a gift of capital, as distinct from a gift of income, could not fall within the exemption contained in s. 14 (*i*) (ii) of the Act, assessed the settlor to duty upon the value of the whole of the property settled.

Held, by *Latham* C.J., *Dixon* and *McTiernan* JJ., that in the case of both parts of the fund the Commissioner could not, upon a proper understanding of the Act, have been satisfied that the settlement was made for or towards the maintenance, education or apprenticeship of any person. *Per Rich* J.: No gift contained in the settlement constituted one of the extreme cases in which a court could be justified in holding that only one finding was open to the Commissioner.

Per Starke J.: The gift of the income to the daughter during infancy was a gift for her maintenance, education or apprenticeship within the meaning of s. 14 (*i*) (ii) if the Commissioner was satisfied that the gift was not excessive in amount having regard to the legal and moral obligations of the donor to afford the maintenance, education or apprenticeship.

Held, also, by the whole Court, (i) that the general rule applied by the Commissioner was not warranted by the Act and (ii) that on an appeal from a decision of the Commissioner refusing exemption under s. 14 (*i*) (ii) of the Act the Court does not substitute its opinion for that of the Commissioner, but considers only whether he has proceeded according to law and has exercised his judgment or discretion unaffected by extraneous or irrelevant considerations or any misconception or misapplication of the law.

CASE STATED.

Upon the hearing of an appeal to the High Court by Charles Malcolm Campbell MacCormick from an assessment for gift duty made by the Federal Commissioner of Taxation under the *Gift Duty Assessment Act* 1941-1942 upon MacCormick, the donor under a marriage settlement, *Rich* J., at the request of the parties, pursuant to s. 35 of the above-mentioned Act and s. 18 of the *Judiciary Act* 1903-1940, stated for the opinion and consideration of the Full Court a case which was substantially as follows :—

I. Mutual admissions of fact put in evidence are as follows :—

1. The above-named Charles Malcolm Campbell MacCormick (hereinafter called " the appellant ") on 21st June 1943 duly executed a deed of settlement in the words and figures following :—" This settlement made the twenty-first day of June One thousand nine hundred and forty-three between Charles Malcolm Campbell MacCormick of Sydney in the State of New South Wales Electrical

Engineer (hereinafter called the husband) of the first part Ella May Millar of Sydney (herein called the wife) of the second part and" (two named persons therein called the trustees) "of the third part witnesseth that in consideration of a marriage intended shortly to be solemnized between the husband and the wife it is hereby agreed that the Trustees shall hold the shares, investments and securities specified in the schedule hereto belonging to the husband and by instruments of even date herewith transferred by him into the names of the Trustees in trust for the husband until the said intended marriage and after the solemnization thereof upon the trusts and subject to the powers and provisions hereafter declared and contained concerning the same. The said shares, investments and securities and the proceeds of sale thereof or other assets or investments for the time being representing them are hereafter referred to as 'the Fund.'

(i) (*a*) As to two-thirds of the Fund the Trustees shall pay the net income derived therefrom to the wife during her life for her separate use and during the intended coverture without power of anticipation and after her death shall hold the capital and income of the said two-thirds of the Fund in trust for such of the children of the marriage as may survive her and attain the age of twenty-one years and if more than one in equal shares.

(*b*) If there shall be no child of the said intended marriage who shall attain a vested interest under the foregoing trust the Trustees shall hold the said two-thirds of the Fund and the income thereof in trust for such persons and purposes and in such manner as the wife shall by will appoint and in default of and subject to any such appointment upon trust for such persons as would have become entitled thereto under the Statutes for the distribution of intestate estates and in the shares proportions and manner provided by those Statutes had the wife died possessed thereof and intestate without having been married to her now intended husband.

(*c*) Notwithstanding the Trusts and provisions contained in sub-clauses (*a*) and (*b*) hereof the Trustees may in their absolute discretion transfer to or vest in the wife absolutely the whole or any proportion they may think of the said two-thirds of the Fund.

(ii) (*a*) The remaining one-third of the Fund shall be held by the Trustees upon trust for Micaele Vivian Millar daughter of the wife by adoption and so that the same shall not vest in the said daughter absolutely unless and until she attains the age of thirty-five years.

(*b*) During the infancy of the said daughter the income arising from the said one-third of the Fund or so much thereof as the Trustees in their discretion may think fit shall be paid or applied for the maintenance, support and personal benefit of the said daughter

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and any portion thereof not so paid or applied shall be accumulated and invested with liberty for the Trustees during any subsequent year to resort to any such accumulation for the support or benefit of the said daughter.

(*c*) From the attaining by the said daughter of the age of twenty-one years to pay to her for her absolute use and benefit the income of the said one-third of the Fund until she shall acquire a vested interest in the capital.

(*d*) Notwithstanding any of the trusts and provisions contained in sub-clauses (*a*), (*b*) and (*c*) hereof the Trustees may after the said daughter has attained the age of twenty-one years or married in their absolute discretion pay to or vest in the said daughter or apply for her advancement or benefit the whole or any portion of the capital of the said one-third of the Trust Fund.

(iii) The Trustees may either retain the Fund in its present form of investment or invest the same or any portion thereof in or upon such investments, deposits, securities, or real or personal property whether authorized by law for the investment of Trust Funds or not and whether involving liability or not as they may from time to time in their discretion think fit.

In witness whereof the parties hereto have affixed their hands and seals on the date first above written.

The schedule referred to.

Name of Company	Number of Shares
Australian Consolidated Industries Ltd.	9375
British Tobacco Co. (Australia) Ltd.	6024
Associated Newspapers Ltd.	2495
The Broken Hill Pty. Co. Ltd.	3251
Bank of New South Wales	65
The Commercial Banking Co. of Sydney Ltd. ..	150 "

The said deed was on the said day duly executed by the other parties thereto.

2. The appellant and Ella May Millar party of the second part to the said deed intermarried on 25th June 1943 at Sydney in the State of New South Wales.

3. Micaele Vivian Millar in the deed mentioned was an infant aged five years at the date of the execution of the deed and was adopted prior thereto by Ella May Millar as her daughter under the provisions of the *Child Welfare Act* of the said State.

4. On 29th February 1944 the appellant furnished to the Deputy Commissioner of Taxation for the said State a return pursuant to s. 19 of the *Gift Duty Assessment Act* 1941-1942. (This return was put in evidence.)

5. On the last-mentioned day Messieurs Norman C. Oakes and Sagar solicitors for the appellant wrote to the Deputy Commissioner omitting formal parts and irrelevant matter in the words and figures following :—" We now furnish on behalf of Mr. MacCormick the gift duty return herein. We also send you a copy of the deed of marriage settlement effecting the gift. Subsequently to the execution of the deed the marriage was duly solemnized so that the deed became effective ; and in this regard we beg to claim on behalf of Mr. MacCormick that the effect of the deed is to make provision for his wife and stepchild and invite the Commissioner's consideration, under s. 14 (*i*) (ii), that the gift is made for or towards the maintenance of his wife and maintenance and education of his stepchild, and if the amount of the provision under the deed is considered excessive for those purposes, that at least a very substantial portion of it could reasonably be regarded as within the sub-par. taking into account the station in life of the parties. We shall be glad, if desired, to confer with the Department on the whole subject." (The letter containing these extracts was put in evidence.)

6. No conference on the matter of the return or of the letter was held by the solicitors or by anyone on behalf of the appellant with the above-named respondent or the Deputy Commissioner or any officer representing the respondent before the issue of the notice of assessment hereafter set out.

7. On 20th March 1944 a notice of assessment for gift duty was issued by N. Gerrans Deputy Commissioner of Taxation and duly sent to the appellant. The notice of assessment is in the words and figures following :—" In accordance with the *Gift Duty Assessment Act*, 1941-1942, and the *Gift Duty Act*, 1941, Gift Duty has been assessed on the value of the gift made on 21/6/43, as under :

Value of Gift	£50,997	0	0
Value of this and all other gifts made whether within eighteen months previously, or eighteen months subsequently	£50,997		
Rate of Duty applicable to this aggregate value 12.18 per cent.			
Duty at 12.18 per cent. on £50,997	£6,211	8	8
Additional Duty, s. 42	£5	0	0
Total amount payable	£6,216	8	8

Last day for payment of this amount is 19th April, 1944."

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8. Enclosed with the notice of assessment was a memorandum of the Deputy Commissioner in the words and figures following : " The claim for exemption under s. 14 (*i*) (ii) of the Act cannot be conceded."

9. On 19th April 1944 the solicitors forwarded to the Deputy Commissioner an objection against the assessment in the words and figures following :—" I hereby lodge objection against the above-mentioned assessment in respect of deed of marriage settlement made by me on the 21st June 1943. 1. The duty assessed is unreasonable and excessive and not warranted by law. 2. The gift effected by the said deed was made for and towards the maintenance of my intended wife, Ella May Millar, one of the donees thereunder, and for and towards the maintenance, education or apprenticeship of Micaele Vivian Millar, the other donee mentioned therein, and was not excessive in amount having regard to my legal and moral obligations to afford the said maintenance, education and apprenticeship respectively. 3. Even if the Commissioner were justified in considering that the whole gift was excessive in amount for the purposes mentioned in the last preceding ground of objection, he would be justified in considering that at least a very substantial portion of the gift was not so excessive, having regard to the station in life of myself and my wife and children, and to my legal and moral obligations to three children of my own, and to my financial circumstances. 4. That no facts or circumstances exist or have existed which would warrant the Commissioner in forming the opinion that the said gift was not made for the purposes mentioned in par. 2 hereof or was excessive in amount having regard to my legal and moral obligations to afford such benefits. 5. That there was no evidence or material before the Commissioner upon which he could rationally and in accordance with law form the opinion mentioned in par. 4 hereof. 6. That if, as I am informed and believe, the Commissioner has disallowed my said claim on the ground that the provisions I have made under the deed for the benefit of the said donees are not limited to income to be paid or applied as mentioned in par. 2 hereof but include dispositions under which they may respectively become entitled to capital of the fund the subject of the deed, or on the ground that s. 14 (*i*) (ii) of the *Gift Duty Assessment Act* 1941-1942 does not apply to a gift which involves a settlement of capital, then the disallowance is manifestly erroneous in principle and contrary to law."

10. On 19th May 1944 the objection was disallowed by W. A. Pert Acting Deputy Commissioner and written notice of his decision to disallow the same was on that day given to the appellant.

11. On 17th June 1944 the appellant by his solicitors gave the Deputy Commissioner notice of his dissatisfaction with the decision

disallowing the objection and requested the Deputy Commissioner to treat the objection as an appeal and forward the same to this Court.

12. On 1st November 1944 the Deputy Commissioner notified the appellant that he had that day complied with his request and subsequently this appeal was duly instituted.

13. No facts other than the facts appearing in the above paragraphs were before the respondent or the Deputy Commissioner N. Gerrans or any other officer of the respondent at any time prior to the assessment being made as aforesaid or before the respondent or the Acting Deputy Commissioner W. A. Pert or any other officer of the respondent at any time prior to the objection being disallowed as aforesaid and neither the respondent nor any other officer of the respondent requested any person to furnish him with any information as to any matter appearing in the facts or as to whether the settlement was in fact made for or towards the maintenance education and apprenticeship of Ella May Millar and Micaele Vivian Millar or as to any other matter mentioned in s. 14 (*i*) (ii) of the Act.

14. The appellant is forty-two years of age and is a son of Sir Alexander MacCormick of Sydney and is an electrical engineer by profession. In the year ended 30th June 1942 the income of the appellant amounted to £7,968 from property and £993 from personal exertion.

15. Ella May Millar, now the wife of the appellant, was before her marriage a professional nurse and held the following professional certificates :—double certificates, i.e., general and obstetric, from the Australian Nursing Federation, and was at the date of the settlement thirty-nine years of age.

16. At the date of the settlement and marriage neither the wife of the appellant nor Micaele Vivian Millar was, apart from wearing apparel and personal effects of negligible value, possessed of any assets whatsoever and neither of them had any prospects of acquiring any property otherwise than by virtue of the settlement.

17. The value of the shares settled as aforesaid was at the date of settlement £50,997 and the estimated annual income therefrom was £1,700.

18. The appellant has three infant children of his own by a former marriage, the eldest of whom is sixteen years of age. Their mother was an American and died in March 1943. Her parents had substantial means and are still alive. The appellant believes that the three said children are or will become entitled to substantial benefits from American property but has no exact knowledge of the nature or extent of such benefits nor whether the rights of the children are

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vested or contingent nor whether they are or will be derived by inheritance from or through their mother or from or through trusts created by her parents or grand-parents. Apart from such benefits the three children are entitled to maintenance and support from the appellant and have prospects of acquiring property from him as he is and was at the date of the settlement possessed apart from earnings from personal exertion of investments similar in character and somewhat in excess in value to those the subject of the said settlement.

II, III, IV, . . .

V. Certain oral evidence was tendered on the part of the appellant and objected to on the part of the respondent. I received it subject to the objection which related only to relevance and not to the authority of the officer referred to therein. The evidence was that of Mr. H. A. Sagar, solicitor of the appellant, and was to the effect that after the issue of the assessment and before the lodgment of the notice of objection he interviewed at the office of the Deputy Commissioner of Taxation the officer who was dealing with the matter and asked him had he any objection to informing the witness of the grounds on which the Department had disallowed the taxpayer's claim for exemption. The officer said " No " and informed the witness that an instruction had been given by the Commissioner of Taxation at Canberra that where a donor made a gift, or at all events a settlement, of capital as distinguished from income a claim for exemption under s. 14 (*i*) (ii) was not to be allowed.

In answer to this evidence the Deputy Commissioner of Taxation was called on the part of the respondent. On the assumption that the foregoing evidence was held inadmissible but not otherwise the evidence of the Deputy Commissioner was objected to. He was not the officer whom the solicitor for the appellant had interviewed; that officer being on leave was not called. The evidence of the Deputy Commissioner was to the effect that he had considered the objection and that he had applied his mind to the question whether he was or was not satisfied that the gift the subject of this case was made for or towards the maintenance, education or apprenticeship of any person and to the further question whether the gift was or was not excessive in amount, having regard to the legal and moral obligations of the donor to afford the said maintenance, education or apprenticeship respectively and that he was not satisfied of either of those things. He further deposed that there was an instruction from the Commissioner of Taxation, by which he did not feel bound, that gifts of capital were not to be allowed, but that he would not disobey the instruction; that he had considered whether he would apply it;

that the instruction was not to allow such a gift and did not necessarily involve disallowance ; that if he had thought that the exemption should be allowed he would have approached the Commissioner and told him that it was a case which he thought should be allowed ; and that if there is a gift of capital and there are elements which he thought justified the allowance he could not in face of the instruction allow the exemption but he would approach the Commissioner and tell him there were facts justifying the allowance.

VI. If the evidence stated in par. V. is admissible I am prepared to find that in making the assessment and disallowing the objection the Deputy Commissioner of Taxation acted upon the rule or instruction of the Commissioner which he interpreted as binding him to refuse an exemption to gifts and particularly settlements by way of gift where the subject of the gift was a substantial amount of capital unless special reasons appeared from the nature or circumstances of the gift why the allowance should be specially considered by the Commissioner, when he would refer the matter to him, a course in the circumstances of the present case he saw no reason for adopting. I should be prepared to make the same finding with respect to the disallowance of the objection by the Deputy Commissioner if his evidence were received but the evidence of the solicitor for the appellant were rejected.

VII. The appellant among other contentions proposed to argue that the settlement did not constitute a gift within the meaning of the definition of " gift " contained in s. 4 of the *Gift Duty Assessment Act* 1941-1942. The respondent objected that the contention was not open under the objection lodged.

The following questions of law arising on the appeal were submitted by his Honour for the opinion of the Full Court :—

1. Ought I to receive and am I at liberty to act upon—(*a*) the oral evidence of the solicitor for the appellant set out above ; (*b*) the oral evidence of the Deputy Commissioner set out above ?
2. Having regard to the answer to question 1, am I at liberty to hold on the facts stated that the discretion or judgment claimed by the Commissioner of Taxation under the words " is satisfied " in s. 14 (*i*) has not been exercised according to law ?
3. Whether upon the facts stated the Commissioner or Deputy Commissioner (*a*) might lawfully fail to be satisfied of the matters set out in sub-par. (ii) of par. (*i*) of s. 14 of the *Gift Duty Assessment Act* 1941-1942, or (*b*) was bound to allow the exemption.

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4. Is the question whether the conditions stated in sub-par. (ii) of par. (*i*) of s. 14 aforesaid exist or are fulfilled upon this appeal a matter the Court may decide?
5. (*a*) Whether under the grounds of objection the contention is open to the appellant that the settlement in question is not a gift within the definition contained in s. 4 on the ground that it is not made without consideration in money or money's worth.

(*b*) If such contention is open whether the settlement is within the meaning of that definition a disposition of property without consideration in money or money's worth passing from the disponee to the disponer and if not whether a question remains for the Commissioner in relation to the adequacy of the consideration under that definition.

Weston K.C. (with him *Kerrigan*), for the appellant. The respondent acted outside the law. He held himself bound by irrelevant matter; therefore his decision cannot stand. The parties agree that the evidence of the solicitor and of the Deputy Commissioner of Taxation is admissible: See *Metropolitan Gas Co.* v. *Federal Commissioner of Taxation* (1), and *Moreau* v. *Federal Commissioner of Taxation* (2). On the evidence so given it is open to say that the respondent misdirected himself on the law. He was wrong in giving a "rule of thumb" direction. The discretion or judgment claimed by the respondent under the words "is satisfied" in s. 14 (*i*) of the *Gift Duty Assessment Act* 1941-1942 has not been exercised according to law. It was exercised upon an imperfect knowledge of the facts. Attention is invited to the significance of the use of the word "is" in the expression "gift is made" in s. 14 (*i*) (ii) of the Act. If the character of the gift at the time it is made fulfils the restriction "for or towards the maintenance" in s. 14 (*i*) (ii) it does not matter that with some limitations in the future it might operate otherwise. The subject gift was clearly made for or towards the maintenance of the wife and child or children, and, in the circumstances, it was not excessive in amount. A marriage settlement is, in ordinary parlance, and, perhaps, in legal terminology, a disposition of property for the maintenance of the wife and children and comes within the scope of s. 14 (*i*). It must be assumed that in regard to their powers under the trust deed to transfer or invest, in certain contingencies, the trust fund the trustees will exercise a wise discretion and use their fiduciary powers honestly; otherwise their decisions would be subject to review (*Metropolitan Gas Co.* v. *Federal Commissioner of Taxation* (3)).

(1) (1932) 47 C.L.R. 621.
(2) (1926) 39 C.L.R. 65.
(3) (1932) 47 C.L.R., at p. 633.

Referring to the respondent's " rule of thumb " direction there is not the slightest warrant for the suggestion that alienation of corpus is not a disposition as defined in the Act. The trust instrument provides for two gifts, that is a gift of two-thirds of the specified fund to the intended wife, and a gift of the other one-third share to the daughter, so that if the Court be of opinion that the gift for the daughter comes within the exemption and that the gift to the intended wife does not then the gift to the daughter would be exempt from duty : See by analogy *Perpetual Trustee Co. (Ltd.)* v. *Commissioner of Stamp Duties (N.S.W.)* (1). That there are in substance two gifts is emphasized by the provisions of s. 25 of the Act. The words " legal and moral obligations " in s. 14 (*i*) (ii) mean " legal or moral obligations " or " legal and moral obligations as the case may be." If the Court finds that the respondent has proceeded on a wrong construction of the Act the Court should say that it imputes satisfaction to him (*Millar* v. *Commissioner of Stamp Duties* (2), not reversed on this point by this Court on appeal (3)). Under s. 14 (*i*) (ii) an exemption cannot be made unless the respondent is satisfied about certain specified matters. It is submitted that, in the circumstances, he should be satisfied about those matters and therefore the position is the same as if he were satisfied. The position is that either there is not any appeal at all or there is an appeal in the full sense to the Board of Review and to this Court. It is not proposed to address the Court on the question of whether the arrangement evidenced by the deed was for consideration or consideration in money's worth.

Kitto K.C. (with him *Louat*), for the respondent. The court cannot under the Act substitute its opinion for the opinion of the respondent when that opinion is the criterion of liability or of exemption from liability (*Thomson* v. *Federal Commissioner of Taxation* (4) ; *Moreau* v. *Federal Commissioner of Taxation* (5) ; *Robinson* v. *Federal Commissioner of Taxation* (6) ; *Metropolitan Gas Co.* v. *Federal Commissioner of Taxation* (7)). If the court considers that the respondent has not applied his mind to the correct principles, and, therefore, that his opinion is not one formed in accordance with the law, it should remit the matter to the respondent for reconsideration in accordance with the principles laid down in the court's judgment (*Australian Mercantile Land and Finance Co. Ltd.* v. *Federal Commissioner of Taxation* (8)). On the facts of this case

(1) (1941) 64 C.L.R. 492 ; affirmed (1943) A.C. 425.
(2) (1932) 33 S.R. (N.S.W.) 157 ; 50 W.N. 63.
(3) (1932) 48 C.L.R. 618.
(4) (1923) 33 C.L.R. 73.
(5) (1926) 39 C.L.R. 65.
(6) (1927) 39 C.L.R. 297.
(7) (1932) 47 C.L.R. 621.
(8) (1929) 42 C.L.R. 145.

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the opinion formed by the respondent was clearly right. The fact of his satisfaction is the condition precedent to exemption. The Court will not interfere if the respondent says he is not satisfied unless it finds that his dissatisfaction is such as no reasonable man could reach, unless he were guilty of caprice, or has arisen from some irrational consideration, or some misdirection of himself in law, in which case the Court will remit the matter to him for reconsideration. "Satisfied" was considered in *R.* v. *Connell*; *Ex parte Hetton Bellbird Collieries Ltd.* (1), *Commissioner of Taxes* (*Q.*) v. *Ford Motor Co. of Australia Pty. Ltd.* (2), and *Australasian Scale Co. Ltd.* v. *Commissioner of Taxes* (*Q.*) (3). There is only one gift in this case. That gift was not, and was not expressed to be, for or towards the maintenance, education or apprenticeship of any person as required by s. 14 (*i*) (ii) in order to be exempt from duty. The provision in the instrument relating to the daughter merely empowers the trustees and does not impose an obligation upon them. The benefit so conferred extends far beyond what is comprised in maintenance (*Lowther* v. *Bentinck* (4); *In re Peel*; *Tattersall* v. *Peel* (5)). "Benefit" has a meaning wider than maintenance. The statutory power to apply money for benefit does not authorize payment for maintenance (*Re Patterson*; *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Patterson* (6)). There is not anything in the deed which would prevent the trustees from making a payment of the whole or part of the corpus for the benefit of the daughter, or of the wife, and such payment would be outside the particular purposes mentioned in s. 14 (*i*) (ii). Income is payable to the daughter for many years during which, ordinarily, she should be able to maintain herself. Upon an examination of the limitations of the deed it is impossible to characterize the gift as a gift that is for maintenance, education or apprenticeship of any person whatsoever. The gift was a substantial gift of capital. The gift of capital in addition to the gift of income for maintenance makes the total gift excessive for the purposes for which the section provides. The instruction by the respondent that a gift of a substantial amount of capital cannot be within the exemption in s. 14 (*i*) (ii) is a proper and reasonable instruction. That instruction does not prevent the respondent or his officers from considering the circumstances of every case. The gift was an entire gift (*Commissioner for Stamp Duties* (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.* (7)). An illustration of a settlement creating different interests is shown in *In re Payne*; *Poplett* v. *Attorney-General* (8). In this case, however,

(1) (1944) 69 C.L.R. 407.
(2) (1942) 66 C.L.R. 261, at p. 274.
(3) (1935) 53 C.L.R. 534, at p. 555.
(4) (1874) L.R. 19 Eq. 166.
(5) (1936) Ch. 161, at pp. 164, 165.
(6) (1941) V.L.R. 233.
(7) (1943) A.C., at p. 439.
(8) (1940) Ch. 576.

it was one gift of the totality of the equitable interests that passed under the settlement ; it was not a number of gifts, some present and some future. Section 25 assumes that there can be a gift under which several donees take several interests, reading the word " several " in the strict sense. Section 18 supports this view. Upon the basis that there was only one gift the only real question before the Court is : Could the respondent, properly construing the Act, and not being guilty of capriciousness, have come to the conclusion on the material before him, that the gift was not for or towards the maintenance, education or apprenticeship of any person and was not excessive ? The respondent came to the correct conclusion. The discretion or judgment of the respondent was exercised according to the law.

Weston K.C., in reply.

Cur. adv. vult.

June 27.

The following written judgments were delivered :—

LATHAM C.J. This is a case stated under s. 35 of the *Gift Duty Assessment Act* 1941-1942 in an appeal to the Court from an assessment to gift duty under the Act.

The appellant, Charles Malcolm MacCormick, claims that a marriage settlement made by him is exempt from gift duty by reason of s. 14 (*i*) (ii) of the Act, which provides :—

" Notwithstanding anything contained in this Act, gift duty shall not be payable in respect of— . . . (*i*) any gift concerning which the Commissioner is satisfied— . . . (ii) that the gift is made for or towards the maintenance, education or apprenticeship of any person, and is not excessive in amount, having regard to the legal and moral obligations of the donor to afford the maintenance, education or apprenticeship."

The appellant contends that the gift made by the marriage settlement was a gift as to which the Commissioner ought to have been satisfied that it was made for or towards the purposes mentioned in the provision quoted. The Commissioner was not in fact so satisfied. The Deputy Commissioner who made the actual assessment, acting under administrative instructions, applied a general, though not a universal, ruling of the Commissioner that gifts of capital, as distinct from gifts of income, should not be allowed exemption under s. 14 (*i*) (ii). This ruling is challenged by the appellant. It is also contended for the appellant that the court itself may properly determine whether or not a gift falls within the exemption, and, if the court is satisfied that the provisions for

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exemption are applicable, that the court may and should so hold, irrespective of the opinion of the Commissioner.

The settlement was made on 21st June 1943 between the appellant, his intended wife, and two trustees, and was made in consideration of a marriage intended shortly to be solemnized between the husband and his intended wife. The property settled consisted of shares in companies which were described as "the fund." The fund was settled in trust for the husband until the marriage and thereafter as to two-thirds thereof upon trust that the trustees should pay the net income to the wife during her life for her separate use and during the intended marriage without power of anticipation and after her death in trust as to capital and income for such of the children of the marriage as might survive her and attain the age of twenty-one years, and if more than one, in equal shares. It was further provided that, if there should be no child of the marriage who should attain a vested interest, two-thirds of the fund and the income thereof should be held in trust for such persons and purposes and in such manner as the wife should by will appoint and in default of or subject to any such appointment in trust for her next-of-kin. It was also provided that, notwithstanding the trust mentioned, the trustees might in their absolute discretion transfer to the wife absolutely the whole or any proportion of the two-thirds of the trust property.

As to the remaining one-third of the fund, the settlement provided that it should be held by the trustees upon trust for an adopted daughter of the wife, so that the said property should not vest in the daughter absolutely unless and until she attained the age of thirty-five years. It was provided that during the infancy of the daughter the trustees might apply the income as they in their discretion should think fit for the "maintenance, support and personal benefit of the said daughter." Any accumulation could also be applied in subsequent years for the "support or benefit of the said daughter." After the daughter attained twenty-one years she was to be entitled to the income of the one-third of the property for her absolute use and benefit. There was a further provision that after the daughter attained the age of twenty-one years or married the trustees in their absolute discretion might pay to or vest in the said daughter or apply "for her advancement or benefit" the whole or any portion of the capital of the said one-third of the trust property.

The donor was assessed upon the value of the whole of the property settled, namely £50,997.

In the first place, it was contended that the Commissioner could not properly have refused to be satisfied that the conditions of s. 14 (*i*) (ii)

were fulfilled, because a marriage settlement was necessarily a provision for the maintenance or education of the beneficiaries thereunder. In my opinion this contention cannot be supported. It is true that moneys which come into the hands of beneficiaries under a marriage settlement may, in the absence of any provision to the contrary, be applied by them for their maintenance or education, but it is impossible to say that a marriage settlement as such is a provision for maintenance or education.

It was further argued that the Commissioner was wrong in treating the marriage settlement as a single gift, and that, in determining whether he was satisfied that the conditions of s. 14 (*i*) (ii) were fulfilled, he should have treated the settlement as containing at least two gifts—one to the intended wife and the other to the adopted daughter, who were the persons in whose favour the settlement immediately operated upon its execution. It was argued that where there were several donees under a settlement there must of necessity be several gifts. This contention, however, is not supported by the terms of the Act. It is sufficient to refer to s. 25 (4), which provides as follows :—" Where there is more than one donee under the same gift, each of them shall be liable only for the same proportion of the gift duty as the value of his interest bears to the total value of the gift." This provision shows that there may be several donees under the same gift. In the present case over 20,000 shares in a number of companies were settled. It would be unreal to regard the transaction as consisting of separate gifts of the shares in each company, or as consisting of separate gifts of each share. It is a single gift of the property which, by the settlement, is vested in the trustees. Similarly, although the beneficiaries under the settlement include several persons, namely the wife, her adopted daughter, and possibly the children of the marriage, or other persons who might become entitled under the general power of appointment contained in the settlement, it would be equally unreal to hold that there are separate gifts to each of those persons. But though it would, in my opinion, be wrong to treat the settlement as containing as many gifts as there are (or may be) donees, the settlement does deal quite separately with two-thirds of the fund and the other one-third of the fund. The provisions relating to the parts into which the fund is divided are quite separate and they operate quite independently. In this case, therefore, I think that the settlement should be regarded as making two gifts, in respect of which the provision for exemption should be separately considered.

The exemption of a gift under the relevant provision depends upon whether it is a gift " made for or towards the maintenance, education

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or apprenticeship " of certain persons. In the present case the gift is made by a written instrument which defines the terms of the gift, and in such a case the character of the gift must be determined by reference to those terms. The gift is not limited to the provision of maintenance, education or apprenticeship. The trustees may apply income for the maintenance of the adopted child, but both income and capital which may reach the hands of the beneficiaries under the settlement may be spent in such manner as the beneficiaries think proper. It is clear that the wife may spend either capital or income received under the settlement as she thinks proper. The trust in favour of the adopted daughter during her infancy entitles the trustees to pay or apply the income for her " maintenance, support and personal benefit." " Benefit " is a very wide term—wider than " education " or " maintenance " : See *In re Kershaw's Trusts* (1) ; *Lowther* v. *Bentinck* (2) ; *In re Peel* ; *Tattersall* v. *Peel* (3). If capital is paid to the adopted daughter, she may expend it as she thinks proper. It cannot be said that the Commissioner was bound by reason of the terms of the settlement to be satisfied that the gift was a gift for or towards the maintenance, education or apprenticeship of the beneficiaries under the settlement.

There is no dispute that the answer to be given to question 1 in the case should be in the affirmative.

Question 2 asks whether, if certain evidence referred to in question 1 is admissible (and it is now agreed that it is admissible), the learned trial Judge is at liberty to hold on the facts stated in the case that the discretion or judgment claimed by the Commissioner under the words " is satisfied " in s. 14 (*i*) of the Act has not been exercised according to law. The facts stated show that the Deputy Commissioner who made the assessment applied a general, though not an absolute, rule that a gift of capital, as distinct from a gift of income, could not fall within the exemption. I agree with the argument for the appellant that such a rule cannot be justified. It is sufficient to refer to the word " apprenticeship " in s. 14 (*i*) (ii). A gift for or towards the apprenticeship of any person would generally be a gift of a capital sum. Accordingly, in my opinion, the Commissioner did not actually in the present case exercise the discretion or judgment given to him by this provision in accordance with law. The result is that in my opinion question No. 2 should be answered in the affirmative. This answer, however, does not mean that the assessment should be remitted to the Commissioner because the majority of the Court (my brothers *Dixon*, *McTiernan* and myself) are of opinion

(1) (1868) L.R. 6 Eq. 322.
(2) (1874) L.R. 19 Eq. 166.
(3) (1936) Ch. 161.

that the facts stated in the case show, for reasons which we have stated, that the Commissioner could not, upon a proper understanding of the Act, have been satisfied that the gift was (or the gifts were) made for or towards the maintenance, education or apprenticeship of any person.

Question 3 is as follows :—

"Whether upon the facts stated the Commissioner or Deputy Commissioner might lawfully fail to be satisfied of the matters set out in sub-par. (ii) of par. (*i*) of s. 14 of the *Gift Duty Assessment Act* 1941-1942 or was bound to allow the exemption."

This question should be answered by declaring that the Commissioner or Deputy Commissioner might lawfully fail to be satisfied of the matters mentioned and that he was not bound to allow the exemption.

Question 4 is as follows :—

"Is the question whether the conditions stated in sub-par. (ii) of par. (*i*) of s. 14 aforesaid exist or are fulfilled upon this appeal a matter the Court may decide ?"

This Court has, in a series of cases involving the interpretation of taxation statutes, held that certain matters are to be determined by the exercise of a discretion by the Commissioner of Taxation, or in accordance with an opinion formed by him, and that upon an appeal the Court cannot substitute the discretion or opinion of the Court for that of the Commissioner. But in those cases the Court has also held that, if it be shown that the discretion was exercised or the opinion formed upon a wrong construction of the relevant statute, or that the discretion exercised or the opinion formed was so irrational as to be not a discretion or an opinion of the character contemplated by the statute, an assessment should be set aside and remitted to the Commissioner for reconsideration in accordance with law : See *Moreau* v. *Federal Commissioner of Taxation* (1) ; *Australasian Scale Co. Ltd.* v. *Commissioner of Taxes* (*Q.*) (2) ; *Commissioner of Taxes* (*Q.*) v. *Ford Motor Co. of Australia Pty. Ltd.* (3). It has uniformly been held that upon an appeal under Acts the provisions of which are indistinguishable in relevant particulars from the present Act it is not for the Court to substitute its opinion for that of the Commissioner. I am, therefore, of opinion that question 4 should be answered in the negative.

The contention to which question 5 relates has been withdrawn by the appellant and it is unnecessary to answer that question.

(1) (1926) 39 C.L.R. 65.
(2) (1935) 53 C.L.R. 534.
(3) (1942) 66 C.L.R. 261.

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RICH J. Section 14 of the *Gift Duty Assessment Act* 1941-1942 provides that, notwithstanding anything contained in the Act, gift duty shall not be payable in respect of "(*i*) any gift concerning which the Commissioner is satisfied— . . . (ii) that the gift is made for or towards the maintenance, education or apprenticeship of any person, and is not excessive in amount, having regard to the legal and moral obligations of the donor to afford the maintenance, education or apprenticeship." The criterion of exemption from duty is the satisfaction of the Commissioner (or other authorized officer) of the matters specified. It is for the officer to decide whether he is satisfied that the purpose of the gift is maintenance, education or apprenticeship, and that the gift is not excessive in amount for the purpose; and in so deciding he must have regard to the legal and moral obligations of the donor to afford the maintenance, education or apprenticeship. When a question is raised as to whether a particular gift is the subject of exemption under the sub-clause, it is the legal duty of the Commissioner or other officer to address his mind to the question and come to a decision whether or not he is satisfied of the relevant matters. If he takes irrelevant considerations into account in arriving at a purported decision, this is tantamount to having failed to give a decision at all. The fact that this has occurred may appear from direct evidence on the point, or may be inferred from the circumstances. Thus, a purported decision under this sub-clause allowing exemption of a gift of, say, a million pounds alleged to be made for the education of an individual would, at any rate in the absence of evidence of very extraordinary circumstances, justify the inference that irrelevant matters had been taken into consideration. So would a refusal to grant exemption to a gift of, say, a hundred pounds by a father to a son to apprentice him to a trade, if there were unquestioned evidence that this was the usual premium, and nothing to suggest that the gift was not in fact made for the purpose stated. But an express or constructive failure of the officer to give a decision would not justify a court in assuming to take the matter out of his hands and make the decision for him. The differences in language between the provisions of pars. (*f*) (ii) and (iii) and (*i*) and the rest of the section sufficiently indicate that the fact of the Commissioner's satisfaction is intended to be an essential ingredient in the existence of a legal right to exemption. Hence, the most that a court could do would be to treat the matter as still undecided, and require him to proceed to decide it according to law.

I see no reason for supposing that, in order that a gift may be susceptible of exemption under the sub-paragraph now in question, it is necessary that it should be expressed to be made for maintenance, education or apprenticeship: it is sufficient if one of these purposes

can be inferred from the circumstances. Also, if separate gifts are made to several persons by a single document, I see no reason for doubting that some may be entitled to exemption whilst others may not, or for thinking that, for this purpose, the line of separation may not be horizontal as well as perpendicular. In gifts of lump sums to A, B and C, the gift to A may be exempt, and those to B and C may not. In a gift to X for life with remainder to Y, X's life interest may go free whilst Y's remainder is dutiable.

Applying these considerations to the facts before the Court, I have arrived at the following conclusions. Having regard to the fact that the amount settled, though considerable, is not enormous in relation to the donor's wealth and social position, that his obligation as husband and head of the family is to support and maintain his wife and family, in which latter term is included the child of his wife by a former marriage (*Hill* v. *Hill* (1) ; *Eversley* on *Domestic Relations*, 3rd ed. (1906), pp. 260, 261), and that on the evidence led in the appeal before me I found that in making the assessment and disallowing the objection the Deputy Commissioner of Taxation acted upon the rule or instruction of the Commissioner which he interpreted as binding him to refuse an exemption to gifts, and particularly settlements by way of gift where the subject of the gift was a substantial amount of capital unless special reasons appeared from the nature or circumstances of the gift why the allowance should be specially considered by the Commissioner, when he would refer the matter to him, a course in the circumstances of the present case he saw no reason for adopting, I am of opinion that the officer has taken irrelevant considerations into account in arriving at his decision, and that the duty cast upon him by the sub-clause has not been performed according to law. The second question should therefore be answered in the affirmative. I am of opinion, however, that no gift here in question constitutes one of those extreme cases in which a court could be justified in holding that, on the material before the officer and his stated or possible conclusions as to its authenticity, only one decision is open to him. In the present case, the whole matter lies in a field which is his and his alone. It follows that, upon the facts of the case, the first arm of question 3 should be answered in the affirmative and the second in the negative, and question 4 should be answered in the negative.

The objection to the admissibility of evidence having been withdrawn, question 1, should be answered—Yes. Question 5 was withdrawn. The remaining questions should be answered as follows :—

2. Yes.
3. First arm—Yes ; second arm—No.
4. No.

(1) (1902) P. 140.

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STARKE J. Case stated pursuant to the *Gift Duty Assessment Act* 1941-1942 and the *Judiciary Act* 1903-1940.

The taxpayer executed a marriage settlement and certain instruments of transfer whereby he transferred into the names of trustees certain shares, investments and securities of considerable value upon trust for himself until solemnization of his intended marriage and thereafter upon trust: (*a*) As to two-thirds of the fund that the trustees should pay the net income derived therefrom to his intended wife during her life for her separate use and without power of anticipation and after her death hold the capital and income of the said two-thirds in trust for children of the marriage with gifts over in certain events. The trustees were authorized in their absolute discretion to transfer to or vest in the wife the whole or any proportion of the two-thirds fund. (*b*) As to the remaining one-third of the fund upon trust for an adopted daughter of his intended wife so that the same should not vest in the daughter until she attained the age of thirty-five years. And during the infancy of the daughter upon trust that the income arising from the said one-third of the fund or so much thereof as the trustees should in their absolute discretion think fit be paid or applied for the maintenance support and personal benefit of the daughter and that any portion thereof not so applied should be accumulated and invested and upon the daughter attaining the age of twenty-one years upon trust to pay to her for her absolute use and benefit the income of the said one-third fund until she should acquire a vested interest in the capital. The trustees were authorized in their absolute discretion after the daughter had attained twenty-one years or married to pay or vest in the daughter or apply for her advancement or benefit the whole or any portion of the one-third trust fund.

The Commissioner assessed the full value of the property comprised in the settlement to gift duty as at the time of the making of the settlement.

The taxpayer claims that gift duty is not payable by reason of the provisions of s. 14 (*i*) (ii) of the *Gift Duty Assessment Act* 1941-1942, which enacts that gift duty shall not be payable in respect of any gift concerning which the Commissioner is satisfied that the gift is made for or towards the maintenance, education or apprenticeship of any person, and is not excessive in amount, having regard to the legal and moral obligations of the donor to afford the maintenance, education or apprenticeship. The case states that the Commissioner or his officers refuses exemption under this sub-paragraph in respect of gifts and particularly settlements by way of gift where the subject of the gift is a substantial amount of capital unless special reasons appeared from the nature or circumstances of the gift, which did not exist in

the present case. Objection was taken to the admissibility of evidence upon which this finding is based but it was, rightly I think, abandoned on the argument before this Court.

The Act lends no support to the Commissioner's principle of assessment. It refers to any gift made for or towards maintenance, education or apprenticeship and does not exclude gifts of capital for that purpose. And it is now, I think, settled, in this Court, that the Commissioner cannot base his dissatisfaction upon a mistaken construction of the section or upon grounds that have no relevance to the matter he has to consider. In short he must act according to reason and justice and not arbitrarily or capriciously: See *Stenhouse* v. *Coleman* (1). Prima facie, therefore, the assessment is bad and in the ordinary course would, I presume, be remitted to the Commissioner for further consideration. But the Commissioner before this Court took wider ground and contended that none of the provisions or dispositions of the marriage settlement exempt the property described therein or any part of it from gift duty. As I understood the argument the gift exempted by s. 14 (*i*) (ii) is the whole property comprised in the marriage settlement or at least the two-thirds of the fund settled in favour of the wife and the one-third of the fund settled in favour of the daughter. But I am unable to agree with this contention. The Act itself contemplates gifts of any interest in real or personal property whether at law or in equity, the creation of trusts and the liability of donors, donees and trustees to the extent mentioned in s. 25 (7) to gift duty. It also provides for the distribution proportionally of gift duty if there be more than one donee under the same gift. And if the interest of a donee is a future interest then that he should not be personally liable until it becomes an interest in possession: See Act s. 4 (definition) and s. 25 (5). Disposition of property by way of gift may therefore be created by trusts giving rise, as in this case, to various beneficial interests. And I see no reason why those various interests may not, in themselves, be gifts within the meaning of the Act and within the scope of s. 14 (*i*) (ii).

Turning now to the marriage settlement in this case I agree that the gift of the two-thirds share to the wife is not a gift for or towards the maintenance, education or apprenticeship of the wife or any other person. It is no doubt a provision for the wife, but not necessarily by way of maintenance. The gift of the income of one-third of the trust fund to the adopted daughter is expressed to be for her maintenance, support and personal benefit and even though the trustees have full authority to pay or vest in the daughter or apply for her

(1) (1944) 69 C.L.R. 457.

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advancement or benefit the whole or any portion of the capital one-third fund of the trust fund, that does not alter the purpose or the character of the gift. But it is still open to the Commissioner to consider whether the gift is not excessive in amount having regard to the legal and moral obligations of the donor to afford the adopted daughter maintenance, education or apprenticeship. And it will also be for the Commissioner to assess the value of that gift and the duty payable in respect thereof. That is a matter upon which he, and not the court, must be satisfied. The gift of the one-third of the trust fund to the adopted daughter vesting absolutely when she attains thirty-five years is not, I think, a gift for or towards her maintenance, education or apprenticeship nor is the gift of the income of the one-third fund to the adopted daughter upon her attaining the age of twenty-one years for her absolute use and benefit. Those gifts are no doubt provisions for her benefit, but they are not expressed to be nor are they necessarily for her maintenance, education or apprenticeship. And none of the other dispositions in the marriage settlement fall within the provisions of s. 14 (*i*) (ii).

Categorical answers should not, I think, be given to the questions stated. Questions 1, 2 and 5 were not argued and disappeared from the controversy between the parties. I would answer the questions generally in this way: That the gift of the income to the adopted daughter during infancy is a gift for her maintenance, education or apprenticeship within the meaning of s. 14 (*i*) (ii) of the *Gift Duty Assessment Act* 1941-1942 if the Commissioner is satisfied that the gift is not excessive in amount having regard to the legal and moral obligations of the donor to afford the maintenance, education or apprenticeship.

DIXON J. In my opinion the gift upon which duty has been assessed cannot be brought within the exemption made by s. 14 (*i*) (ii) of the *Gift Duty Assessment Act* 1941-1942.

Having regard to the nature of the settlement and to the limitations it contains, I think that the settlement amounts to one gift within the meaning of the definition of "gift" in s. 4. That definition depends upon the words "disposition of property", which are also defined in the same section. In this case the settlement is the disposition of property under the definition of those words. The Act contemplates that under one gift interests may be taken by more than one donee: See s. 18 (1) (*a*), s. 25 (4) and (5) and the definition of "donee" in s. 4. The reference to future interests in s. 25 (5) indicates that where different donees take in succession there is not necessarily more than one gift.

The shares constituting the trust " fund " form the subject of the gift. Even if the limitations affecting the income and capital of two-thirds of the fund were considered one gift and those affecting the remaining one-third were considered another gift, it would, I think, make no difference in the result. For whether the settlement constitutes one gift, or comprises two gifts, in the case of both parts of the fund, it goes far beyond the purposes of maintenance, education or apprenticeship for which alone the exemption provides. Indeed, in the limitations in favour of the appellant's wife there is no reference to any such purpose even in respect of income. In her case the corpus is limited to such of the children of the marriage as survive her and attain full age and, if none such, to such persons as she may appoint under a general power and in default of appointment to her statutory next-of-kin, on the assumption of her not having married the appellant. But, notwithstanding these limitations, the trustees are given an absolute discretion to transfer to her the whole or any part of the two-thirds share of the corpus.

In the case of her adopted child, there is a discretionary trust to apply the income of the one-third share during infancy for the child's maintenance, support and personal benefit and otherwise to accumulate. After attaining twenty-one she is to receive the income, without any restriction as to the purpose of its application, until she attains thirty-five, when the corpus is to vest in her in possession. In the meantime, however, the trustees are to have an absolute discretion to apply the whole or any portion of the capital of the one-third share for her advancement or benefit or to vest it in her.

These provisions appear to me necessarily to take the settlement altogether outside the scope of the exemption. I do not think that it is possible to treat the exemption as covering a marriage settlement, containing such limitations, simply because the main purpose of making a settlement upon an intended wife is to insure that her maintenance is always provided for. It may be conceded that the words " for or towards " in s. 14 (*i*) (ii) involve purpose and that the purpose of a gift may appear independently of any written instrument. But it is another thing to treat a general actuating motive as enough to fulfil the conditions stated in the provision when the gift itself is not definitely connected with the achievement of any of the purposes of the exemption and contains limitations completely outside them.

I do not think that it is possible to regard the life interest limited to the wife as a separate gift to her, nor the discretionary trust for the maintenance, support and personal benefit of her adopted daughter as a separate gift to the latter. There is nothing in this

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view inconsistent with the application given in *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd.* (1) to legislation containing some not very dissimilar provisions. There was but one donee in that case, unless the trustees were included in the category, and the settlement marked out the gift to him, a gift falling short of complete legal or equitable ownership. The gift was constituted by the settlement. It was decided that neither the possibility of an interest resulting to the settlor nor his position as one of the trustees of the settlement were matters inconsistent with the donee's assuming and retaining possession and enjoyment of the gift to the entire exclusion of the donor or of any benefit to him. Neither the decision itself nor the approval of *In re Cochrane* (2) means that the limitations to every donee must be regarded as a distinct and independent gift. As Lord *Russell* said in summarizing the reasoning in the latter case of *Palles* C.B., "gift in the context meant beneficial gift. A person who declares trusts of property only gives the beneficial interests covered by the trusts. Everything else he retains and does not give" (*Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co.* (3)). Briefly as this expresses the matter, implicit in it is the reasoning upon which their Lordships negatived both points. It does not touch the question whether such a settlement as that now under consideration is the gift and, though creating interests in a plurality of donees or possible donees, does not amount to more than one gift.

For the foregoing reasons I am of opinion that, in point of law, the settlement cannot fulfil the conditions of which the Commissioner must be satisfied before he can give the appellant the benefit of the exemption. I think that it follows that the Commissioner could not lawfully be satisfied under s. 14 (*i*) (ii) that the gift was "made for or towards the maintenance, education or apprenticeship of any person."

The Commissioner was not in fact so satisfied. But the difficulty is that the Deputy Commissioner, who in this matter appears to have discharged the functions of the Commissioner acting under a delegation, assigned a reason for denying the claim to exemption which, it is said, cannot be supported. If I had been of opinion that the case was one in which it was open to the Deputy Commissioner to find that the conditions of exemption were fulfilled, I do not think that I would have been prepared to allow the decision refusing the exemption to stand, resting, as the case stated shows it to have done, on the application of a general rule against allowing an exemption in

(1) (1941) 64 C.L.R. 492; (1943) A.C. 425; 67 C.L.R. 234.
(2) *In re Finance Act* 1894 *and Cochrane* (1905) 2 I.R. 626; (1906) 2 I.R. 200.
(3) (1943) A.C., at p. 441.

any case in which the gift covered capital as well as income. It may be that the Deputy Commissioner has expressed the departmental rule badly or incompletely. But as it has been formulated the rule appears to involve an inadmissible addition to the conditions prescribed by the exemption, an addition which in some states of fact may operate to exclude cases to which the exemption is applicable. This has not, however, been its effect in the present case. For in the settlement before us the limitations of capital are not themselves within the purposes of the exemption and are not incidental to any limitations that fall within those purposes.

In these circumstances, I think that the second and third questions in the case stated should be answered against the taxpayer. I would, however, frame the answer to the second question specially and say that the Commissioner ought not in point of law to have exercised the judgment claimed under the words " is satisfied " in s. 14 (*i*) otherwise than by refusing the exemption.

There is no dispute about the answers to questions numbered 1 and 5.

The fourth question asks—Is the question whether the conditions stated in s. 14 (*i*) (ii) exist or are fulfilled a matter the Court may decide ? This Court has, I think, adopted the general view, in dealing with Federal legislation *in pari materia*, that references to the opinion, judgment, discretion and satisfaction of the Commissioner are intended to make his decision the criterion of the specific matter indicated, subject usually to reconsideration by a Board of Review. The result is that in such cases the Court on appeal does not substitute its decision for that of the Commissioner, but considers only whether he has proceeded according to law and has exercised his judgment or discretion unaffected by extraneous or irrelevant considerations or any misconception or misapplication of the law.

I think that we should interpret s. 14 (*i*) consistently with this view. I would, therefore, answer the fourth question—No. At the same time I think that a consideration of the reasons briefly given in *Commissioner of Stamp Duties* (*Q.*) v. *Beak* (1) for placing upon a reference to " discretion " in a provision dealing with valuation a somewhat different interpretation shows that we have pursued a course in reference to Federal legislation which derives more support from usage than from logic.

(1) (1931) 46 C.L.R. 585, at p. 597.

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McTIERNAN J. I agree with the answers which my brother *Dixon* has given to the questions and his Honour's reasons for those answers.

Questions answered as follows :—1. *Yes* ; 2. *Yes* ; 3. (*a*) *Yes* ; 3. (*b*) *No* ; 4. *No* ; 5. *Not answered. Case remitted to Rich J. Costs costs in the case.*

Solicitors for the appellant, *Norman C. Oakes & Sagar.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.